CHAPTER - IV

Grounds of Judicial Review of Administrative Action

Judicial review means review by courts of administrative actions with a view to ensuring their legality. An administrative action is legal if it is according to law, within the powers given to the authority by law, and in conformity with the principles of natural justice where such principles are applicable. It was described by Professor De Smith as ‘inevitably sporadic and peripheral’. Later on, he has conceded that ‘the circumstances in which the courts have been prepared to intervene to provide relief for unlawful administrative action have expanded in spectacular fashion’. The primary purpose of judicial review is to provide a mechanism whereby the courts examine what a public body has done, or failed to do, with reference to the relevant legislation, and come to a determination as to the legality of the public body’s actions.

Judicial review is central in dealing with the malignancy in the exercise of administrative power. Outsourcing of legislative and adjudicatory powers to the administrative authorities as an imperative of modern system of governance has brought the law of judicial review of administrative action in prime focus. Law dealing with judicial review of administrative action is largely judge induced and judge led, consequently thicket of technicalities and inconsistencies surround it. Anyone who surveys the spectrum of judicial review finds that the fundamentals on which courts base their decisions include Rule of Law, administrative efficiency, fairness and accountability. These fundamentals are necessary for making administrative action “people-centric”. Courts have generally exhibited a sense of self-restraint where

---

judicially manageable standards do not exist for judicial intervention. However, “self-restraint” is not the absence or lack of power of judicial review. Courts have not hesitated, in exceptional situations, even to review policy matters and subjective satisfaction of the executive. Judicial review is a protection and not a weapon. The following are the main ground of judicial review of administrative action.

4.1 Doctrine of Ultra Vires

The juristic basis of judicial review is the doctrine of ultra vires. It was first introduced in relation to the statutory companies. However, the doctrine was not paid due attention up to 1855. The doctrine of ultra vires was first established by House of Lords in *Ashbury Railway Carriage and Iron Company Ltd v. Riche.*

The literal interpretation of the phrase ultra vires is beyond the powers or lack of power. An act which is for any reason in excess of power (ultra vires) is often described as being ‘outside jurisdiction’. ‘Jurisdiction’, in this context, means simply ‘power’, though sometimes it bears the slightly narrower sense of ‘power to decide’, e.g. as applied to statutory tribunals. Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. The doctrine envisages that an authority can exercise only so much power as is conferred on it by law. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. Under this doctrine, when power is conferred on an administrative body, the instrument conferring the power may itself provide for restriction on the exercise of the power. In

---

8 (1875) L.R. 7 H.L. 653.
10 Chief Constable v. Evans, (1982) 3 All ER 141 (154).
its purest form the ultra vires doctrine holds that an inferior body must act within the scope of powers, and that if it exceeds its powers its determination will be a nullity. Sir William Wade, leading exponent of this view, has thus written that, "The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law".  

In the context of Administrative Law, Schwartz explains the doctrine of ultra vires as follows:

The Jurisdictional principle is the root principle of administrative law. The statute is the source of agency authority, as well as of its limits. If an agency act is within the statutory limits, its action is valid; if it is outside them (ultra vires), it is invalid. No Statute is needed to establish this; it is inherent in the constitutional positions of agencies and courts.

4.1.1 Classification of Ultra Vires

The doctrine of ultra vires is classified into two categories – Substantive Ultra vires and Procedural Ultra vires.

4.1.1.1 Substantive Ultra Vires

Substantive Ultra vires means where a decision has been reached outside the powers conferred on the decision taker. If an administrative authority acts outside the substance of the power conferred then it is, quite simply, ‘doing the wrong thing’. This is the concept of substantive ultra vires. For example, a power to run a tram system does not authorize the running of a bus system. In Laker Airways v. Department of Trade, the minister was empowered under the Civil Aviation Act 1971 to give the Civil Aviation Authority guidance as to the exercise of its functions. The minister could not thereby

---

13 Ibid.
17 (1977) 2 ALLER 182.
issue the Authority with an instruction to revoke Freddie Laker’s license to operate the skytrain service from London to New York.

4.1.1.2 Procedural Ultra Vires

Procedural ultra vires means where the prescribed procedures have not been properly complied with. An administrative authority may be exercising a power for an authorized purpose but, if it fails to follow a required procedure, its actions will be open to challenge. The authority here may ‘doing the right thing’ but it is doing it ‘in the wrong way’. This is the concept of procedural ultra vires.\(^{18}\)

The question arises as to whether the observance of the procedural requirement is mandatory or directory. It is for the courts to determine the question finally. The Courts take the view that while the directory procedural norms may be substantially complied with, the mandatory norms of procedure must be meticulously observed. While the non-observance of directory norms may not be fatal, the non-observance of mandatory procedure renders the rules ultra vires.\(^{19}\)

The essence of this doctrine is that administrator acting under statutory power can do only things which the statute authorized him to do so. Anything done beyond the power conferred in this would be ultra vires. This doctrine permits the court to strike down the decision made by the administrative body, which it has, no power to make or does travel beyond the power conferred upon him. This principle has been illustrated in *Attorney General v Fulham Corporation*.\(^{20}\) In this case the local authority in question had clear statutory power under the Baths and Wash Houses Acts, 1846 to 1848 to run municipal baths and wash houses. It was held that by starting to operate a municipal laundry, to which the public brought their cloths to be washed not by themselves but by the council employees, was beyond the power. To run municipal baths and wash house does not and cannot include the running of municipal laundry in which public will have

\(^{18}\) Supra note 12.
\(^{19}\) Raza Buland Sugar Co. v. Rampur Municipality, AIR 1965 SC 895.
\(^{20}\) (1921) 1 Ch 440.
access for their clothes being washed not by themselves but by the Council of employees. It was a case of simple ultra vires by the local authorities, and accordingly, the running of a municipal laundry for such a purpose was held to be acting beyond powers and authorities by the municipal authority and was held to be ultra vires.\(^{21}\)

An act is ultra vires either because the authority has acted in excess of its power in the narrow sense, or because it has abused its power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Power is exercised in bad faith where its repository is motivated by personal animosity towards those who are directly affected by its exercise. Power is no less abused even when it is exercised in good faith but for an authorized purpose or on irrelevant grounds.\(^{22}\) In *Ridge v. Baldwin*,\(^{23}\) a leading case on natural justice, the House held that the dismissal of a chief constable, being vitiated by failure to give him a fair hearing, was void, and from that it follows inexorably that it was outside jurisdiction, i.e. ultra vires.\(^{24}\) In *Anisminic v Foreign Compensation Commission*,\(^{25}\) where the House of Lords considered in detail the theory of jurisdiction, makes the distinction between lack of jurisdiction, or errors going to jurisdiction, which roughly equate to a decision being ultra vires, and an erroneous exercise of jurisdiction which covers the intra vires decisions, where it will not normally intervene.

In *Rohtas Industries Ltd v. Rohtas Industrial Tribunal*,\(^{26}\) the arbitrators held under Section 10-A of the Industrial Disputes Act, 1947 that the workers who had gone on illegal strike were not entitled to wages for the strike period, and was further liable to pay compensation worth Rs 80,000 and Rs 69,000 to the company. Here, the High Court quashed the award regarding compensation. The Supreme Court, on appeal, affirmed the

\(^{21}\) *Ibid.*
\(^{22}\) *Supreme Court Employees Welfare Association v Union of India*, AIR 1990 SC 434.
\(^{23}\) (1964) AC 40 p. 489.
\(^{25}\) (1969) 2 AC 147.
High Court’s Act by incorporating the English law of torts, which had not been adopted into the Indian law.

In *Shiromani Akali Dal v. Election Commission*, 27 the Court held that the Election Commission could not undertake an inquiry into recognised political party could not get the prescribed minimum number of seats or votes in an election, while deciding about its de-recognition under the Election Symbols (Reservation on Allotment ) Order 1968. The Election Commission had to merely take into account the results of the election. Similarly, it was held in *Rajendra Prasad Agarwal v. Union of India,* 28 that the tribunal, set up under the Unlawful Activities (Prevention) Act 1967, could only decide whether there was sufficient cause for declaring an association illegal. It could not adjudicate upon the legality or otherwise of the declaration made under proviso to Section 3(3) of the Act that the association would, for reasons to be recorded in writing, be illegal with immediate effect. In another case, a tribunal’s order directing the government to pay to the teachers of a primary School set up by the Central Government, the same scales of pay as were payable to the teachers of a Secondary school of the government was held to be ultra vires its jurisdiction, as those primary school teachers had no right to get the same pay scales.

In *State of U.P. v. Modi Distillery,* 29 it was held that a rule conferring power on the states to levy excise duty beyond the limits fixed by the constitution of India, is ultra vires as it exceeded the constitutional limits.

From the above mentioned case law it is observed by the critics that the restraints implied into Acts of Parliament have in reality been created by the judges on their own initiative and owe little or nothing to any perceptible Parliamentary intention. Eminent judges, writing extra judicially, have described the doctrine as a ‘fairy tale’ 30 and a ‘fig-
leaf serving to provide a façade of constitutional decency, with lip service to the sovereign Parliament, while being out of touch with reality. The reality, it is argued, is that the judges are fulfilling the duties of their constitutional position, acting in their own right independently of Parliament, adjusting the balance of forces in the constitution, and asserting their title to promote fairness and justice in government under the rule of law.

It accords also with a judicial suggestion that the courts would be entitled to reject legislation undermining the rule of law, if for example Parliament were to attempt to abolish judicial review. Yet in their decisions the judges are firm upholders of the classical doctrine of ultra vires, based upon assumed Parliamentary approval, since they regard this as the sheet-anchor of their constitutional authority.

4.2 Wednesbury Principles

Wednesbury unreasonableness is a term that is used to refer to the principle enunciated in the British case of Associated Provincial Picture Houses v. Wednesbury Corporation which is popularly known as Wednesbury case, wherein the basic principles of judicial review were laid down. This historic doctrine is now so often in the mouths of judges and counsel that it has acquired a nickname like ‘the Wednesbury principle’, ‘Wednesbury unreasonableness’, or ‘on Wednesbury grounds’. As Lord Scarman explained,

Wednesbury principles is a convenient legal ‘shorthand’ used by lawyers to refer to the classical review by Lord Greene MR in the Wednesbury

---

33 Supra note 9 at 39.
34 Supra note 9 at 40.
35 (1948) 1 K.B. 223.
case\textsuperscript{37} of the circumstances in which the courts will intervene to quash as being illegal the exercise of administrative discretion.

In this case the Sunday Entertainment Act, 1932 gave the local authority power to allow cinema to open on Sunday ‘subject to such conditions as the authority think fit to impose.’ The Wednesbury Corporation gave the plaintiff, Associated Provincial Pictures House Ltd., permission subject to condition that no children under 15 should be allowed in with or without an adult. The plaintiff brought an action against the said condition. His argument was that the imposition of the condition was unreasonable and that in consequence it was ultra vires the corporation\textsuperscript{38}.

The court held that it could not intervene to overturn the decision of the defendant corporation simply because the court disagreed with it. To have the right to intervene, the court would have to form the conclusion, firstly that the corporation, in making that decision, taking into account factors that ought not to have been taken into account, or secondly that the corporation failed to take account factors that ought to have been taken into account, or lastly the decision was so unreasonable that no reasonable authority would ever consider imposing it\textsuperscript{39}.

The court held that the condition did not fall into any of these categories. Therefore, the claim failed and the decision of the Wednesbury Corporation was upheld. Not satisfied with this decision, the Associated Provincial Picture Houses Ltd. moved the Court of appeal, presided by Lord Greene, M.R.Somervell L. J and Singleton J. Lord Greene passed the judgement rejecting the appeal of M/s Associated Provincial picture Houses Ltd\textsuperscript{40} while passing the judgment he made the following observations:

..... a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matter which he is bound to consider. He must exclude from his consideration matters which are

\textsuperscript{37} Supra note 35.  
\textsuperscript{38} Ibid.  
\textsuperscript{39} Ibid.  
\textsuperscript{40} Ibid.
irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."\(^{41}\)

This above principle came to be popularly known as "Wednesbury Principle". Lord Greene in his closing remarks in his judgment holds\(^{42}\):

The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the authority have kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have made to it. In such a case, again, I think the Court can interfere. The power of the court to interfere in each is not as an appellate authority to override a decision of the local authority but as a judicial authority which is concerned and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which parliament has confided in them.\(^{43}\)

That sums up the wednesbury principle of reasonableness/unreasonableness. Since the pronouncement of this judgment the courts have been rather skeptical in interfering with the administrative decision of the executive officers. However, the courts did not relinquish their right to interfere, if the administrative decisions are utterly arbitrary and unreasonable. Thus, it can be concluded that Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral and ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. ‘Wednesbury’ is now a common and convenient label indicating the special standard of unreasonableness which has become the criterion for judicial review of administrative discretion.\(^{44}\)Justice Markandey Katju, in this regard, observes:

The Wednesbury principle is often misunderstood to mean that any administrative decision which is regarded to be unreasonable must be struck down. The correct understanding of the Wednesbury principle is that


\(^{42}\) Supra note 35.

\(^{43}\) Ibid.

\(^{44}\) *Supra* note 9 at 354.
a decision will be said to be unreasonable in the Wednesbury sense if: (1) it is based on wholly irrelevant consideration, or (ii) it has ignored a very relevant material which it should have taken into consideration, or (iii) it is so absurd that no sensible person could ever reached to it.  

In the Indian Legal context, this principle has been explained by the Supreme Court in the case of Tata Cellular v. Union of India, laying down the norms for the courts to apply this principle. According to Supreme Court,  

"The duty of the Court is to confine itself to the question of legality, its concern should be:

(i) Whether a decision making authority exceeded its powers?
(ii) Committed an error of law,
(iii) Committed a breach of the rules of natural justice,
(iv) Reached a decision which no reasonable Tribunal would have reached, or
(v) Abused its powers."

While defining these parameters of scope of judicial review, it is ruled that the Court should not interfere with the administrative decision unless it is illogical or suffer from procedural impropriety or is shocking the conscience of the Court. It is limited to the legality of decision making power and the legality of the order per se and that is limited to deficiency of decision making process and not the decision. Lord Diplock in the celebrated cases Council of Civil Service Union v. Minister of civil Services, classify under three heads the grounds upon which administrative action is subject to control by judicial review. These grounds are as under:

(i) Illegality,
(ii) Irrationality and

46 (1994) 6 SCC 651.
47 Ibid.
(iii) Procedural impropriety.

(i) Illegality

The Plain meaning of illegality is that what is contrary to law. What is beyond the powers of the person is illegal in the sense that everything is illegal that is not warranted by law and the court interferes with the orders which are contrary to law. This ground of judicial review is based on the principle that administrative authorities must correctly understand the law and its limits before any action is taken. Therefore, if the authority lacks jurisdiction or fails to exercise jurisdiction or abuses jurisdiction or exceeds jurisdiction, it shall be deemed that the authority has acted "illegally".

The court will quash a decision where the authority has misunderstood a legal term or incorrectly evaluated a fact that is essential for deciding whether or not it has certain powers. So, in *R v Secretary of State for the Home Department, ex parte Khawaja*, the House of Lords held that the question whether the applicants were "illegal immigrants" was a question of fact that had to be positively proved by the Home Secretary before he could use the power to expel them. The power depended on them being "illegal immigrants" and any error in relation to that fact took the Home Secretary outside his jurisdiction to expel them. However, where a term to be evaluated by the authority so broad and vague that reasonable people may reasonably disagree about its meaning, it is generally for the authority to evaluate its meaning. For example, in *R v Hillingdon Borough Council ex Parte Pulhofer*, the local authority had to provide homeless persons with accommodation. The applicants were a married couple, who lived with her two children in one room and applied to the local authority for aid. The local authority refused aid because it considered that the Pulhofers were not homeless and the House of Lords upheld this decision because whether the applicants had accommodation was a question of fact for the authority to determine.

---

55 (1986) AC 484.
In *Tata Engineering and Locomotive Co. Ltd. v Assistant Commissioner of Commercial Taxes*, the Supreme Court held that the courts ought to have exercised jurisdiction in a case arising from sales tax proceeding where assesses had claimed exemption on the ground that the goods in the stockyard of the assesses in different states were still of the assesses and that the property in them had not passed to the purchaser but the sales Tax Authorities had refused to allow exemption without hearing the assesses. There is an obligation on the High court to superintend and supervise the proceeding before the subordinate tribunal and to see that the orders passed by the subordinate tribunals are not illegal and contrary to law.

(ii) *Irrationality*

Irrationality as a ground of judicial review was developed by the Court in *Associated Provincial Picture House v. Wednesbury Corporation*, later came to be known as “Wednesbury test” to determine ‘irrationality’ of an administrative action. Lord Diplock equated it with “wednesbury unreasonableness.” It simply means that administrative discretion should be exercised reasonably. Accordingly, a person entrusted with discretion must direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the subject he has to consider. If he does not obey those rules he can be said to be acting unreasonably. Lord Diplock beautifully sums up “wednesbury unreasonableness” as a principle that applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it. Quite obviously the concept of wednesbury unreasonableness is extremely vague and is not capable of objective

---

56 AIR 1967 SC 1410.
57 *Jhabban v S.D.M.*, All WR (H.C.) 34.
58 *Supra* note 35.
evaluation. Hence wednesbury unreasonableness cannot be defined in the form of standard tests for universal application.\textsuperscript{60}

In \textit{Robert v. Hopwood},\textsuperscript{61} the Council, in adopting a policy of paying higher wages than national wages than national average of its workers was unreasonable, for the discretion of the Council was limited by law and the Council was not free as a statutory authority to pursue socialist policy at the expense of rate-payers. The House of Lords held that irrespective of wording the statute, the Council had a duty to act reasonably and his discretion was limited by law.

In \textit{Director of Public Prosecution v. Hutchinson},\textsuperscript{62} the local authority passed a by-law which prohibited unauthorized access to Greenhome Common Air force Base. The act under which the authority purported to exercise its power provided that no by-law should be passed which affected the right of registered commoners in area. Inaction for trespass against anti-nuclear protesters the defendant pleaded the invalidity of by-law. The House of Lords held that the By-laws were invalid and as a result the protester’s conviction for trespass was set aside.

In \textit{Maneka Gandhi v. Union of India},\textsuperscript{63} it was held that an order made under Section 10 of the Passport Act, 1967 could be declared to be bad under the chapter of fundamental right in the constitution of India, if it was so drastic in nature, as to be imposing unreasonable restrictions on the individual freedom. The decision of the government was simply irrational and unreasonable. In \textit{Air India v. Nargesh Mirza},\textsuperscript{64} was held that termination of the service of an air hostess on her becoming pregnant was held to be irrational and ultra vires.

\textsuperscript{60} Ajoy, P.B., \textit{Administrative Action and the Doctrine of Proportionality in India}, IOSR Journal of Humanities and Social Science, Vol. 1, issue 6 (Sep-Oct, 2012), pp. 16-23.
\textsuperscript{61} (1925) AC 578.
\textsuperscript{62} (1990) 2 AC 783.
\textsuperscript{63} AIR 1978 SC 597.
\textsuperscript{64} (1981) 4 SCC 335.
(iv) Procedural Impropriety

Procedural impropriety encompassed the obligation to observe procedural requirements laid down in the legislative instrument which conferred the power which is based on principles of natural justice and fair procedure.\(^65\) Requirement of fair procedure may arise in following\(^66\):

(i) As a Constitutional mandate where fundamental rights of the people are violated.

(ii) As a statutory mandate. If statute lays down any procedure which administrative authority must follow before taking action, it must be faithfully followed and any violating of the procedural norm would vitiate an administrative action.

(iii) As an implied requirement, where statute is silent about procedure.

Where statute is silent, courts have insisted that administrative authorities must follow the principles of natural justice which provide fair minimum administrative procedure which every administrative authority must follow while taking decision which has civil or evil consequences.\(^67\)

In *Council of Civil Service Unions v. Minister for the Civil Service*,\(^68\) Lord Diplock explained his preference for the expression procedural impropriety as follows:

I have described procedural impropriety as failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. Further classifying the principle Lord Denning Observed: The rule against bias is one thing. The right to be heard is another. These two rules are the essential

\(^{65}\) Supra note 12 at 83.

\(^{66}\) Supra note 53 at 398.

\(^{67}\) Ibid.

\(^{68}\) Supra note 59.
characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: nemo judex in causa sua and audi alteram partem. They can also put in two wards impartiality and fairness. But they are separate concepts and are governed by separate consideration.69

The object of the natural justice is to ensure that there would be no failure of justice. Therefore, where justice so demands these principles can be circumscribed to meet the requirement of a particular case. The implication of this is that technicalities should not be allowed to defeat the ends of justice.70

While further explaining the scope of procedural impropriety in *Howard v. Boddington*,71 Lord Penzance stated that, ‘in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act.’ At the same time, in assessing the importance of a procedural requirement regard must be paid to basic principles of effectiveness and fairness.72

In Environment Protection case,73 very recently the Supreme Court bench has said that “the Specific grounds upon which a public authority can be challenged by way of judicial review are the same for environmental law as for any other branch of judicial review, namely on the grounds of illegality, irrationality, and procedural impropriety.” Thus, if the environment clearance granted by the competent authority is clearly outside the powers given to it by the Environment (Protection) Act, 1986, and the rules, the high court could quash it on the ground of illegality. In this case, the Apex court said that if the clearance is based on a conclusion so unreasonable that no reasonable authority could ever have come to the decision, the high court could interfere on the ground of

69 Ibid.
71 (1877) 2 PD 203.
73 The Economic Times, SC asks sterlite to pay 100 Crore for flouting green laws in Sterlite Industries(India) Ltd. etc. v. Union of India & Ors. etc, dated on April 3, 2013.
irrationality. And, if the clearance is granted in breach of proper procedure, the high court could review the decision of the authority on the ground of procedural impropriety.

4.2.1 Position of Wednesbury Principles in English Law

The principle of reasonableness is one of the most active and conspicuous among the doctrines, both under the English and Indian Law, in the matter of administrative law, particularly for the judicial review of administrative action of the state. In England, it was long back in 1598 that Lord Halsbury in *Rooke’s case*, 74 stated that where authority was given to commissioners to do according to their discretion, their proceeding ought to be limited and bound with the rule of reason and law. In *R v. Commissioners of Fens*, 75 the Court had granted certiorari against the Commissioners merely on an allegation that they had proceeded unreasonably.

The development of the principles of judicial review was slow and gradual. Many of the principles which remained for years have undergone drastic changes. The Wednesbury principles laid down as early as in 1947, continue to be of vital importance. Earlier, the English Courts could interfere only with the decisions of judicial and quasi-judicial authorities but not with administrative decisions. The decision in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* 76 altered this position. In this case, the plaintiff-company was granted licence under the Cinematograph Act subject to the condition that “no children under the age of 15 years shall be admitted to any entertainments whether accompanied by an adult or not”. This condition was challenged as unreasonable and the provisions of Sunday Entertainments Act were also challenged. The Court held that in considering whether an authority having so unlimited power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The Court cannot interfere as an

---

75 (1666) 2 Keb 43.
76 *Supra* note 35.
ground of judicial review of administrative action

appellate authority overriding the decisions of such authority but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power. Lord Greene, who rendered the leading judgment, dealt with the law in detail and enunciated—"principles of reasonableness", and Indian Courts have followed these ‘Wednesbury principles of reasonableness’ in various decisions. Now, a new wave of thinking has come—whether the Wednesbury principles have to be reappraised or modified by adopting some other principles. Though, in some later decisions principles of judicial review have been expanded, still the Wednesbury principles of reasonableness have great importance in the field of administrative law.

In 1948, the expression “reasonableness” has been used by Lord Greene M.R, in two different senses in the celebrated case, Associated Provincial Pictures Houses Ltd. v. Wednesbury Corporation. In the first sense it was called “umbrella sense” where unreasonable was used as a synonym for a host of more specific grounds of attack such as taking account of irrelevant considerations, acting for improper purpose and acting mala fide. In the second sense, it is called as “substantive sense”, a decision may be attacked if it is so unreasonable that no reasonable public body could have made it. Thus, Wednesbury test has been the major tool used by the English Courts to control discretionary decision, which have passed the legality hurdles of propriety of purpose, etc. It has become a common and convenient level indicating the special standard of unreasonableness, the criterion for judicial review of administrative discretion. However, the Courts have at the same time, developed the substantive meaning of unreasonable independent of Wednesbury, based on abuse of powers. In Council of Civil Service Unions v. Minister for the Civil Service, Lord Diplock preferred the term “irrationality” explaining it as “what can by now are succinctly referred to as Wednesbury unreasonableness.” While the term “irrational” most naturally means “devoid of reasons” and the expression “unreasonableness” means “devoid of satisfactory

---

77 Ibid.
79 Supra note 9.
80 Supra note 59.
reasons.” The question arises which one was a better word. Besides, the expression “arbitrary and capricious,” 81 frivolous or vexatious” or “capricious and vexatious”82 have sometime been used as synonym for “unreasonable.” But according to Wade and Forsyth, the meaning of all these expression is necessarily the same since the true and relevant question must always be “whether the statutory power has been abused.83

On the basis of Lord Greene’s formulation of “unreasonableness” as tantologous and exaggerated, Lord Cooke said in R v. Chief Constable of Sussex Ex. P. International Trader’s Ferry Ltd., 84 that it was not necessary to have such an extreme formulation in order to ensure that the courts remained within their proper bounds as required by the separation of powers. His Lordship in R. v. Secretary Of State for the Home Dept. Ex. p. Daly,85 advocated a simpler and less extreme test and said:

I think that the day will come when it will be more widely recognised that….Wednesbury…. was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can being an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter.

Lord Diplock in Secretary of State for Education & Science v. Tameside Metropolitan Borough council,86 observed:

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinion as to which is to be preferred.

From the study of above mentioned case law, it is clear that earlier, the Wednesbury test was very popular, but with the passage of time its criticism has been

81 Weinberger v. Inglis, (1919) AC 606.
83 Supra note 9 at 354.
84 (1999) 1 AC 418.
85 (2001) 2 AC 532.
86 (1977) AC 1014.
started. Its basic postulate of reasonability was brought into question for being sufficient\textsuperscript{87} and impractical\textsuperscript{88} test to judge validity of administrative actions. In recent times, particularly as a result of the enactment of the Human Rights Act 1998, the judiciaries have resiled from this strict abstention’s approach, recognizing that in certain circumstances it is necessary for them to undertake a more searching review of administrative decisions. Thus the courts started developing a new test for judicial review of administrative actions, which came into existence with lots of opposition, which was the Doctrine of Proportionality. This is a test for judicial review of administrative actions on a more comprehensive basis. The Doctrine of proportionality checks the important link between the administrative objective to be achieved and the means adopted by the administration to achieve it.\textsuperscript{89}

4.2.2 Position in India

The basic principle of judicial review to judge the validity of the administrative action, which has been consistently followed in India, is commonly called "Wednesbury principles" expounded in \textit{Associated Provincial Picture Houses Limited v. Wednesbury Corporation}.\textsuperscript{90} Judicial review is the basic structure of the Constitution in India.\textsuperscript{91} It is not directed against the decision but is confined to the examination of the decision-making process. Where an administrative action is questioned as arbitrary under Article 14 of the Constitution, the role of the Court is confined to "Wednesbury principles". In other words, while examining an administrative decision, what has to be borne in mind is whether the administrative order is rational or reasonable; arrived at after following the principles established by law and by taking into account all the relevant factors and is not manifestly unreasonable that no reasonable authority, entrusted with the power in question, could reasonably have made such a decision. If the

\textsuperscript{88} Supra note, 9.
\textsuperscript{89} Supra note 9 at 366.
\textsuperscript{90} Supra note 35.
\textsuperscript{91} \textit{Minerva Mills v. Union of India}, AIR 1980 SC 1789.
decision is within these parameters, the Court cannot substitute its decision for that of the administrative authority. 92

In E.P. Royappa v. State of Tamil Naidu, 93 while interpreting the scope and content of Article 14, 19 and 21 the Apex Court observed:

Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence.

Again, in Maneka Gandhi v. Union of India, 94 the Supreme Court has ruled that the procedure required by Article 21 for depriving a person of his right to life or personal liberty, must be fair and reasonable, and not arbitrary, fanciful or oppressions.

As regards the judicial review of administrative action, the Apex Court in Bandhua Mukti Morcha v. Union of India, 95 declared that the concept of “reasonableness” and “non-arbitrariness” pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution. It is thus well settled that if the action of the administrative authority is found to be unreasonable, it would be quashed as violative of Articles 14, 19 or 21 of the Constitution.

In I.E Newspapers (Bombay) P. Ltd. v. Union of India, 96 Supreme Court referred to the speech of Lord Greene M.R. in Wednesbury case and adopted the principle in Indian context. Supreme Court also held that ‘in India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution’.

After these important judgments, ‘Wednesbury unreasonableness’ became a regular incantation of the courts whenever cases where brought challenging

---

93 AIR 1974 SC 555.
94 AIR 1978 SC 597.
95 AIR 1984 SC 802.
96 AIR 1986 SC 515.
administrative actions, regardless of the nature of the rights involved, gravity of the rights infringed and the degree of judicial deference required to be paid.

In *Om Kumar v. Union of India*, the Supreme Court heavily relied on Smith’s case and held that ‘the principle of primary review and proportionality on the one hand and the principle of secondary review and Wednesbury reasonableness on the other hand gave a new dimension to administrative law, the former applying in the case of fundamental freedoms and the latter, in other cases’.

In cases of administrative decisions relating to punishment in disciplinary matters, it has been held that the Court would not normally interfere unless the punishment awarded was the one, which shocked the conscience of the Court. The Court would normally remit the matter back to the Authority and not substitute one punishment for the other. In rare situations, however, the Court may award an alternative penalty. Applying this principle, the Delhi High Court in *Neha Jain v. University of Delhi*, holding that cancellation of examinations and debarring the students for next exams as disproportionate punishment for adopting unfair means in the examination, substituted cancellation of only one paper as sufficient punishment. In another case, the Supreme Court has held that Courts cannot encroach into the executive or legislative domain and cannot assume the role of investigation of facts. “The court has only judicial power to review that executive order on Wednesbury principles, but it cannot arrogate to itself the power of the executive. If the order passed by the Union of India is not justifiable on Wednesbury principles, the court can only set it aside and remit the matter back to the executive for a fresh decision, but the court cannot assume the power of the Union of India,” said a Bench of Justice A.K. Mathur and Justice Markandey Katju.

As regards the governmental action, there is always a presumption that policy decisions or governmental action should be reasonable and in public interest. It it fails to

---

97 (2001) 2 SCC 386.
99 AIR 2002 Delhi 403.
100 The Hindu, “Courts cannot encroach upon legislative domain: Apex Court” dated on 27.08.2007.
satisfy either test it would be unconstitutional and invalid. While upholding the decisions of the governments of West Bengal and Orissa changing policies for award of contract for manufacture and supply of High Security Registration Plates (HSRP) for motor vehicles in their state, the Supreme Court has ruled that the government can change its policy and such policy cannot be vitiated only on grounds of change. The authorities have discretionary power to change government policy in public interest but such change should be reasonable and not arbitrary. The government has discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority, said a bench comprising Justice RV Raveendran, Justice R M Lodha and Justice CK Prasad. The court however said, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice. It is always open to the state to give effect to new policy which it wished to pursue keeping in view overriding public interest and subject to principles of Wednesbury reasonableness. A decision is Wednesbury unreasonable if it is so unreasonable that no reasonable person acting reasonably could have made it. The apex court dismissed the two appeals filed by Shimnit Utsch India and Tonnjes Eastern Security Technologies which had challenged the decisions of the West Bengal government and Orissa government, respectively.

4.3 **Doctrine of Proportionality or Strict Scrutiny or CCSU Principles**

The doctrine of Proportionality relates to the principle of interpretation of statutory provisions maintaining fairness and justice. It is a mode of restricting the administrative action from being drastic, when it is used for obtaining desired results. It can be described as a principle where the Court is “concerned with the way in which the

---

104 The Economic Times, “Government can change policy on reasonable ground : Apex Court”, dated on 23.03.2013.
105 Supra note 89.
administrator has ordered his priority; the very essence of decision making consists, surely, in the attribution of relative importance to the factors in the case... This is precisely what proportionality is about.106 In the human rights context, proportionality involves a ‘balancing test’ and the ‘necessity test.’107 The “balancing test” means scrutiny of excessive onerous penalties or infringements of rights or interest and a manifest imbalance of relevant consideration. The “necessity test” means that the infringement of fundamental rights in question must be by the least restrictive alternative.108 It is a safeguard against the unlimited use of legislative and administrative powers and considered to be something of a rule of common sense, according to which an administrative authority may only act to exactly the extent that is needed to achieve its objectives.

The modern procedural definition of the proportionality test is relatively clear. Tom Hickman, while acknowledging various different models, identified the most common formulation as a three-part procedure.109 The reviewing court must consider:

(i) Whether the measure was suitable to achieve the desired objective.
(ii) Whether the measure was necessary for achieving the desired objective.
(iii) Whether, even so, the measure imposed excessive burdens on the individual it affected.110

The third element is often termed proportionality stricta sense and is the provision that requires balancing of interest. In the UK, the doctrine has often been defined in contrast to the recognized ‘irrationality’ principle and the test coined in Wednesbury. Lord Steyn argued that although ‘there is an overlap’ between irrationality and

---

107 Supra note, 3
110 Ibid.
proportionality and ‘most cases would be decided in the same way’, the intensity of
review’ is ‘greater’.111

The principle of proportionality envisages that a public authority ought to maintain
a sense of proportion between his particular goals and the means he employs to achieve
those goals, so that his action impinges on the individual rights to the minimum extent to
preserve the public interest. This means that administrative action ought to bear a
reasonable relationship to the general purpose for which the power has been conferred.
The doctrine also explains that it is not permissible “to use a sledgehammer to crack a
nut” or that “where paring knife suffices, battle axe is precluded.”112

The implication of the principle of proportionality is that the court will weigh for
itself the advantages and disadvantages of an administrative action. Only if the balance is
advantageous, will the court uphold the administrative action. The administration must
draw a balance-sheet of the pros and cons involved in any decision of consequence to the
public and to individuals. The measures adopted by the administration must be
proportionate to the pursued objective. On the other side, Proportionality requires the
Court to judge whether action taken was really needed as well as whether it was within
the range of courses of action which could reasonably be followed. Proportionality is
more concerned with the aims and intention of the decision-maker and whether the
decision-maker has achieved more or less the correct balance or equilibrium. Courts
entrusted with the task of judicial review has to examine whether decision taken by the
authority is proportionate, i.e. well balanced and harmonious, to this extent court may
indulge in a merit review and if the court finds that the decision is proportionate, it
seldom interferes with the decision taken and if it finds that the decision is

111 R v. Secretary of State for Home Department ex parte Daly (2001) UKHL 2623.
112 Chairman-cum-Managing Director, Coal India Ltd. v. Mukul Kumar Choudhuri, AIR 2010 SC 75; Management
of Coimbatore District Central Co-opt. Bank v. Secretary, Coimbatore D.C.Co-opt. Bank Employees Association,
disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.\textsuperscript{113}

With respect to India, administrative action affecting fundamental freedoms have always been tested on the anvil of proportionality. By ‘proportionality’ it is meant that the question whether, while regulating exercises of fundamental rights, the appropriate or least restrictive choice of measuring has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of administrative order, as the case may be. Under the principle court will see that the legislature and the administrative authority “maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purposes which they were intended to serve”. The legislature and the administrative authority are given an area of discretion or a range of choice but as to whether the choice made infringes the rights excessively or not is for the court to decide. This is the principle of proportionality.\textsuperscript{114}

4.3.1 Origin and Development in England

The doctrine of proportionality in its present form is of European origin. A product of interpretation of Platonic and Cicerian theory, the concept was first applied in Prussia in the late 18th Century as the law was codified on \textit{Rechtsstaat} ('constitutional state') lines\textsuperscript{115}, and refined by the German courts in the 19th Century.\textsuperscript{116} The principle took further hold in continental Europe after the Second World War, when proportionality became embedded in the new German constitution. It was then taken up by the European Court of Human Rights upon its founding in 1959, and later by the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{113} \textit{Wednesbury’s principles of reasonableness: The law revisited}, available on legalperspectives.blogspot.in/2010/05/wednesbury-principles-of.html visited on 10.07.2013 at 9.45 a.m.
\item\textsuperscript{114} \textit{Om Kumar v Union of India}, AIR 2000 SC 3689.
\item\textsuperscript{115} Theo Barclay, “ \textit{The proportionality test in UK Administrative Law—a new ground of review or a fading exception?}”, The student journal of Law. Also available on www. Sjol-co. UK/issue3/proportionality visited on 29.03.2013.
\item\textsuperscript{116} T.Poole, “\textit{Proportionality in Perspective}”, LSE Law, Society and Economy Working Papers (2010).
\end{enumerate}
\end{footnotesize}
fledgling European Community as a conceptual ‘meta principle of judicial governance’.  

The development of strict scrutiny or proportionality in Administrative Law in England is however recent. Administrative action was traditionally being tested on Wednesbury grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases by applying this principle. In the case of these freedoms, Wednesbury principles are no longer applied.  

The European Convention for the protection of Human Rights has been now adopted in England in 1996. Explaining the strict scrutiny or proportionality in the wake of convention and Human Rights Act, 1998, the Lord Chancellor said a more rigorous scrutiny than the traditional judicial review will be required. It is often used as a general starting point for public authorities in making administrative decisions. This means the decision of officials should be judged not just against the criteria of legality and rationality, but against a benchmark which says that limitations on fundamental rights must be necessary to meet a legitimate end in a democratic society, and must not infringe a basic right to a greater extent than is required to achieve that end. It is argued finally, that these jurisprudential and legislative developments increase the judicial protection of the individual and also modifies the structure of traditional judicial review by attributing a new role to national courts.  

In Council of Civil Service Unions v. Minister for the Civil Service, regarding the doctrine of proportionality, Lord Diplock remarked:

---

118 Observed by Justice Jagannadha Rao in Supra note 97.  
Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community.

In England, the doctrine of proportionality was extended in 1977 in Beta-Muhle joseph Bergmann KG v. Grows Farms Grubtt,\(^{122}\) popularly known as 'skimmed milk powder case'. In this case regulation was passed by council for the purpose of reducing the vast over supply of skimmed milk powder. The regulation attempted to solve the problem by forcing farmers to use skimmed milk powder for animal feed instead of cheaper soya milk powder. The European Court of justice ruled that, although the council had the powers necessary to issue such a directive, and that solving the oversupply was a legitimate aim, the measures prescribed were overly burdensome on farmers, and hence disproportionate to the problem.

After this, the leading authority on the status of proportionality in England was \(\textit{R v. Secretary for Home Department Ex. p. Brind}\).\(^{123}\) In this case, the House of Lords explained that proportionality was a more exacting test in some situations and was to be rejected as requiring the court to substitute its own judgment for that of the proper authority. It was also reiterated that proportionality could not become a part of administrative law in England unless European Convention of human rights, 1998, and Fundamental Freedoms were incorporated by the parliament into domestic law.\(^{124}\) Further, in this case Lord Bridge explained the two judgments which the court can make while exercising power of judicial review of administrative action:

\(^{122}\) (1977) 25n26. 52/76.
\(^{123}\) (1996) 1 AC 696.
\(^{124}\) Supra note 14.
(1) Primary judgment as to whether the particular competing public interest justifies the particular restriction.

(2) Secondary judgment as to whether a reasonable administrative officer, on material before him, could reasonably make the primary judgment.\textsuperscript{125}

It was held that the Court would make only the secondary judgment and the primary judgment would be made by the administrative officer whom parliament has entrusted the discretion. It follows that if the European Human Rights Convention is incorporated into the domestic law of England Court will be obliged to make the primary judgment also and apply the principle of proportionality in situations involving human rights. Until it is done the court would confine itself to making a secondary judgment only.\textsuperscript{126}

The same principle was restated in 1996 in R v. Ministry of Defence, ex parte Smith\textsuperscript{127} In this case, Lord Bingham M.R. explained the position of the Court in the absence of the Convention and of proportionality, as follows:

The appellant’s right as human being is very much in issue. It is now accepted that this issue is justiciable. This does not of course mean that the Court is thrust into the position of the primary decision maker.

With the incorporation of European Convention on Human Rights into the domestic law of England in 1998, by Parliament passing the Human Rights Act, 1998, the legal parameters of judicial review has undergone a change and “Wednesbury” Principle of unreasonable has been replaced by the doctrine of “Proportionality.”\textsuperscript{128}

In another important judgment, R (Daly) v. Secretary of State for the Home Department,\textsuperscript{129} demonstrated how the traditional test of Wednesbury unreasonableness

\textsuperscript{125} Ibid.
\textsuperscript{126} Ibid.
\textsuperscript{127} (1996) 1 All ER 257.
\textsuperscript{129} (2001) 2 AC 532.
has moved towards the doctrine of necessity and proportionality. Lord Steyn noted that the criteria of proportionality are more precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between the two:-

(i) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

(ii) Proportionality test may go further than the traditional grounds or review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.

(iii) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.\(^\text{130}\)

The next question arose as to whether doctrine of proportionality applies only where fundamental human rights are in issue or whether it will come to provide all aspects of judicial review. Lord Steyn in *R. (Alconbury Development Limited) v. Secretary of State for the Environment, Transport and the Regions*,\(^\text{131}\) stated as follows:-

I consider that even without reference to the Human Rights Act, 1998 the time has come to recognize that this principle (proportionality) is part of English administrative law not only when Judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing.

Lord Steyn was of the opinion that the difference between both the principles was in practice much less than it was sometimes suggested and whatever principle was applied the result in the case was the same.\(^\text{132}\)

Whether the proportionality will ultimately supersede the concept of reasonableness or rationality was also considered by Dyson Lord Justice in *R.*

\(^{130}\) *Ibid.*  
\(^{131}\) (2001) 2 All ER 929.  
(Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence,\(^{133}\) and stated as follows:

We have difficulty in seeing what justification there now is for retaining Wednesbury test ..... but we consider that it is not for this Court to perform burial rights. The continuing existence of the Wednesbury test has been acknowledged by House of Lords on more than one occasion. A survey of the various judgments of House of Lords, Court of Appeals, etc. would reveal for the time being both the tests continued to co-exist.

Position in English Administrative Law is that both the tests Wednesbury and proportionality continue to co-exist and the proportionality test is more and more applied, when there is violation of human rights, and fundamental freedom and the Wednesbury finds its presence more on the domestic law when there is violations of citizens ordinary rights. Proportionality principle has not so far replaced the Wednesbury principle and the time has not reached to say good bye to Wednesbury much less its burial.\(^{134}\)

4.3.2 Development of Doctrine in India

In India, Earlier the courts apply the principle of proportionality in a very limited sense. The principle is applied not as an independent principle by itself as in European Administrative law, but as an aspect of Article 14 of the Constitution, viz., an arbitrary administrative action is hit by Art. 14. Therefore, where administration action is challenged as arbitrary under Art 14, the question will be whether administrative order is ‘rational’ or ‘reasonable’ as the test to apply is the Wednesbury test.\(^{135}\) As has been stated by the Supreme Court in *E. Royappa v State of Tamil Nadu*,\(^{136}\) if the administrative action is arbitrary, it could be struck down under Art. 14.

In recent time, now, Proportionality is the most emerging concept of Administrative Law in India. It enjoins that if the administrative authority attempt to achieve a goal, then the means employed to achieve that goal should be such that they

\(^{133}\) (2003) QB 1397.
\(^{134}\) *Supra* note 113.
\(^{135}\) *Associated Provincial Picture House v Wednesbury Corporation*, (1947) 2 All ER 680.
\(^{136}\) AIR 1974 SC 555.
should infringe the Fundamental Rights to the minimum extent, i.e., it should be proportionate to the object sought to be achieved.\textsuperscript{137}

The first decision of the Supreme Court in administrative law which formally referred to proportionality was \textit{Ranjit Thakur v. Union of India}\textsuperscript{138} In this case, the Supreme Court observed:

Judicial review, generally speaking, is not directed against a decision, but is directed against the “decision making process”. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias.

In the above case the appellant was found guilty in court-martial proceedings and a punishment of dismissal from service and sentence of imprisonment was imposed as permitted by the Army Act, 1950. He was charged under Section 41(2) of the Army Act for disobeying a lawful command given by his superior officer. The appellant challenged the decision of the summary court on four grounds. One of the grounds was that the punishment given to him was so disproportionate that it in itself was indicative of malice and was a conclusive evidence of bias.\textsuperscript{139}

The Hon’ble Apex Court accepted this contention of the appellant and while allowing the appeal ruled:

The penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution. The punishment imposed in the present case is so striking disproportionate as to call for and justify interference.\textsuperscript{140}

\textsuperscript{138} AIR 1987 SC 2386.
\textsuperscript{139} \textit{Ibid}.
\textsuperscript{140} \textit{Ibid}.
After this decision of the Apex Court, “proportionality”, as ground of judicial review of administrative action came to be applied frequently.\textsuperscript{141} In 1997 in the case of \textit{Union of India v. Ganhyutham},\textsuperscript{142} the court observed that where no fundamental freedom is affected, the Court need not to go into the question of proportionality. There was no connection that the punishment impounded is illegal or vitiated by procedural impropriety. As to irrationality there is no finding by the tribunal that the decision is one which no sensible person who weighed pros and cons could have arrived at nor was there is finding based on material that the punishment is outrageous and in defiance of logic. Neither Wednesbury nor CCSU tests are satisfied.

In \textit{Om Kumar v. Union of India},\textsuperscript{143} the Supreme Court has said that administrative action in India affecting fundamental freedoms has always been tested on the anvil of proportionality in the last fifty years even though it has not been expressly stated that the principle that is applied is the proportionality principle. The Supreme Court further observed that there are hundreds of cases dealt with by our courts. In all matters the proportionality of administrative action affecting fundamental rights under Art. 19(1) or Art. 21 have been trusted by the Courts as a primary reviewing authority and not on the basis of Wednesbury principle. It may be that the courts did not call it proportionality even though it really was.

In \textit{Regional Manager, U.P.SRTC v. Hoti Lal},\textsuperscript{144} the service of a bus conductor in U.P. State Road Transport Corporation was terminated as he was found to carry ticketless passengers in the bus. The high court quashed that punishment of termination on the ground that the punishment was “not commensurate with the gravity of the charge.” On appeal, the Supreme Court reversed the high court. It emphasized that the court or tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment was not commensurate with the proven charges. The scope for

\textsuperscript{142} AIR 1997 SC 3387.
\textsuperscript{143} (2001) 2 SCC 386.
\textsuperscript{144} (2003) 3 SCC 605.
interference in this area is very limited and is restricted to exceptional cases. In the instant case, the high court advanced no reasons whatsoever as to why it considered the punishment disproportionate. The Court observed further in this connection:\textsuperscript{145}

If the charged employee hold a position of trust where honesty and integrity are inbuilt requirement of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands.

_Dev Singh v. Punjab Tourism Development Corporation_\textsuperscript{146} is one another case where the Supreme Court did interfere with the punishment of dismissal imposed on the appellant. The court found the punishment “too harsh” “totally disproportionate” to the misconduct alleged and which “certainly shocks our judicial conscience”.

After reviewing the relevant cases,\textsuperscript{147} the Supreme Court has restated the position as follows:

...A court sitting in appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion or penalty; however, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court, then the court would appropriately mould the relief...

The judgment in _Union of India v. Rajesh PU Puthuvalnikathu_,\textsuperscript{148} furnishes an another example of the application of the principle of proportionality to an area other than that of punishments. In this case, applications were invited by CBI for filing up 134 posts of constables. The selection process consisted of a written examination and a viva voca test. There were some allegations of favouritism and nepotism while conducting the physical efficiency test; there were also some irregularities committed during the written examination. As a result thereof, thereof, the entire selection list was cancelled. This was challenged in the high court through a writ petition. The high court after reviewing the

\textsuperscript{145} _Id_ at 614.

\textsuperscript{146} AIR 2003 SC 3712.


various reports and the entire process categorically rejected the allegation of nepotism and favouritism. The court also ruled that there was no justification for cancelling the entire list when the impact of irregularities in the evaluation on merits could be identified specifically. On a reconsideration of the entire record, the court found that only 31 specific candidates were selected undeservedly. The high court allowed the writ petition.

On appeal, the Supreme Court upheld the high court. The court ruled that when only 31 cases were tainted, there was hardly any justification in law to deny appointments to the other selected candidates whose selection was not vitiated in any manner. The court observed on this aspect of the case:149

Applying a unilaterally rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete go-by to contextual considerations throwing to the winds the proportionality in going further than what was strictly and reasonably to meet the situation. In short, the competent authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational.

The important aspect of this case is that the impugned decision of the concerned authority to cancel the entire selection could not be faulted if the standard of unreasonableness as laid down in Wednesbury150 were to be applied. The decision could not be characterized as "so absurd that no sensible person could ever dream that it lay within the powers of the authority." Nevertheless, the court characterized it as ‘arbitrary’ and ‘not reasonable’. This means that the court has adopted a lower threshold of unreasonableness than the Wednesbury test. This is as it should be. Now the

---

149 Id at 289-90.
150 Supra note 35.
"Wednesbury" test should be discarded in favour of a milder “irrationality” test so as to give better protection to individuals against administrative unreasonableness.

In *Bharat Heavy Electrical Ltd. v. M. Chandrasekhar Reddy*, the respondent employee mortgaged his property to the appellant company by deposit of title deeds as security. The title deeds were taken away by the respondent without the knowledge and consent of the Company. On the basis of the title deeds, he tried to sell property mortgaged with the appellant company. The evidence proved that the respondent employed tried to justify removal, by producing fabricated documents. Thus, allegations of misconduct stood proved as grave enough to create genuine lack of confidence in respondent employee. In such circumstances, the punishment of dismissal imposed on the employee was held not harsh. In such a situation, where, the misconduct stands proved, it has been ruled that by reason of the gravity of the offence, the Labour Court could not exercise its discretion and alter the punishment.

Again, in *Management, K. Tea Estates v. A.B.C. Mazdoor Sangh*, the Workman of the Tea Estates, alleged to have entered armed with deadly weapons with a view to gherao the Manager and others in regard to their demand for bonus, caused damaged to property of the estate and wrongfully confined the Manager and others. Punishment of dismissal of concerned workman de hors he allegation of extortion was held to be not disproportionate to the misconduct proved against them.

In *State of Gujarat v. G.M. Dalwadi*, Gajanand M. Dalwadi, since deceased (delinquent officer) was working in the Regional Transport Office under the Commissioner of Transport in the State of Gujarat. He had been working in the Department for Grant of License. An inspection was conducted in the License Branch of

---

151 Ibid.
152 AIR 2005 SC 2769.
153 CMC Hospital Employees' Union v. CMC Vellore Association, AIR 1988 SC 37; JBSKC Co-operative wholesale Stores Ltd. v. Secretary, Sahakari Nonkarana Sangha, AIR 2000SC 3129.
156 AIR 2008 SC 861.
the Regional Transport Office during the period 21-8-1995 to 13-9-1995. Several misconducts committed by the delinquent officer came to the notice of the authorities. It was found that a forged license was granted to one Narendra Kumar who had met with an accident although at the relevant point of time, he was possessing a valid driving licence. A charge sheet was issued against him. The charges against him were proved. The disciplinary authority directed his removal from service by an Order dated 26-10-1998. Aggrieved by the said order imposing punishment upon him, he filed an application before the Gujarat Civil Services Tribunal.

The Tribunal held that since the fraud was conducted by the delinquent at the instance on a fellow clerk, therefore, the punishment of removal from service was too harsh and disproportionate. The same observation was upheld by the Division Bench of the High Court when the State went in appeal. Finally, the State came in appeal to the Supreme Court. The Apex Court held that the order of the Tribunal as also the High Court was erroneous. Their Lordships stated:\[157\]:

The Tribunal is not an appellate authority. Its jurisdiction was also limited. It could not have ordinarily interfered with the quantum of punishment unless it was held to be wholly disproportionate to the imputation of charges. If ordinarily in regard to the commission of the offence of forgery, an order of dismissal/removal is an appropriate punishment; as has been held in a large number of cases, the same could not have been side tracked.

Thus, the Apex Court held the punishment imposed by the disciplinary authority to be proportional to the offence committed.\[158\]

In *Kendriya Vidyalaya Sangathan v. Satbir Singh Mahla*,\[159\] the respondent was working as a trained graduate teacher (Maths) in the services of the appellant, which is the Kendriya Vidyalaya. On 23-2-1999 while functioning as a Trained Graduate Teacher in the Kendriya Vidyalaya No.1, Air Force Suratgarh, he physically assaulted the Principal of the School in his office room which caused serious injury on the right eye of

\[157\] Ibid.
\[158\] Ibid.
\[159\] AIR 2008 SC 1612.
the principal, Shri R.D. Shah. The next day he submitted a written apology. However, he was charge sheeted and an inquiry was held against him.

The Inquiry Officer found the respondent guilty and accordingly an order of removal from service dated 1-5-2000 was passed against him by the disciplinary authority. The respondent filed an appeal before the appellate authority, which rejected the appeal. The respondent then filed an original application before the Central Administrative Tribunal, Jaipur. The Tribunal was of the view that the punishment of removal from service was disproportionate and, instead, it reduced the punishment to withholding three increments for a period of five years with cumulative effect. It thus quashed the removal order.

The appellant filed a writ petition before the High Court which upheld the view of the Tribunal and dismissed the writ petition. He then approached the Supreme Court by way of Special Leave. The Apex Court upheld the punishment of removal as being proportionate to the act committed by the teacher, and restored the removal order.

The Apex Court has, however, repeatedly ruled that interference with quantum of punishment should not be one in a routine manner. It is well settled that while exercising this jurisdiction, the Court would interfere therewith in a very exceptional case.

In case of departmental enquiries and the finding recorded therein, the jurisdiction of the High Court, it is said, is very limited, for instance, where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice,
denial of reasonable opportunity, finding are based on no evidence and/or the punishment is totally disproportionate to the proved misconduct of an employee.\textsuperscript{164}

\textit{Moni Shankar v. Union of India and Another},\textsuperscript{165} the appellant was working as booking supervisor with the central railways. In the course of checking he was found to have overcharged a sum of Rs.5/- on the ticket issued to a decoy passenger. A department disciplinary proceeding was initiated against him. Charges were held proved against him. The appellant was booked for various charges on the basis of a pre-arranged trap. The decoy passenger was a member of the railway protection force and other witness was the head constable of RPF. One of the grounds taken by the appellant was that trap was not arranged as per requirements of paragraphs 704 and 705 of the Railway Vigilance Manual (the Manual) and, therefore, there was no independent witness to prove the charges. His grievances was also that the enquiry officer in the grab of questioning him generally on the circumstances appearing against him, posed leading question, which was not permissible in law.\textsuperscript{166}

The appellant’s application was allowed by the administrative tribunal on account of various infirmities found in inquiry proceeding but the high court reversed the order of the tribunal. Allowing the appeal with cost the apex court observed that the department proceeding was a quasi-judicial one. Although the provisions of the Evidence Act, 1872 are not applicable in the said proceeding, principle of natural justice is required to be complied with. The court exercising the power of judicial review are entitled to consider whether relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded there from while probing misconduct. The tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such

\textsuperscript{165} (2008) 3 SCC 484.
\textsuperscript{166} \textit{Ibid}. 
evidence, the test of the doctrine of proportionality has not been satisfied, the tribunal was within its domain to interfere\textsuperscript{167}. In this way, Doctrine of unreasonableness is giving way to the doctrine of proportionality.

From above mentioned case laws, it can be conclude that the doctrine of proportionality was employed by Supreme Court to test the validity of an administrative action only when the Fundamental Rights of the aggrieved person are disproportionately violated by the administrative authority. So far as the Quasi-judicial bodies within the administrative set up are concerned, their decisions, too, are subject to interference on grounds of proportionality only when the punishment imposed on the aggrieved party is grossly disproportional\textsuperscript{168}.

4.4 Doctrine of Legitimate Expectation

The doctrine of legitimate expectation belong to the domain of public Law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term though they had suffered a civil consequences because their legitimate expectation had been violated. The term ‘legitimate expectation’ was first used by Lord Denning in 1969 and from that time it has assumed the position of a significant doctrine of public Law in almost all jurisdictions\textsuperscript{169}.

In India the Apex Court has developed this doctrine in order to check the arbitrary exercise of power by the Administrative authorities. The doctrine literally means that when a person has a very genuine or valid basis on which something is expected to happen; especially; the prospect of receiving the wealth, honor or the like. Expectation is not like intention. As an operative surgeon may know very well that his patient will probably die of the operation, yet he does not end the fatal consequences, which he expects. He intended the recovery, while the hopes for but does not expect. It was not also different from a mere wish or desire or hope nor was it a claim or demand based on a

\textsuperscript{167} Ibid.
\textsuperscript{168} Supra note 135 at 502-503,
\textsuperscript{169} R. Clark, In Pursuit of Fair Justice, AIR 1996 (J) 11.
right. A mere disappointment would not give rise to legal consequences. The Legitimacy of an expectation can be infused only if it is found on the sanction of law or custom or an established procedure followed in regular and natural sequence. Such expectation should be justifiably legitimate and protectable.\textsuperscript{170}

The Concept of legitimate expectation has been developed both in the context of reasonableness and in the context of natural justice.\textsuperscript{171} Traditionally, the situations in which the principles of natural justice apply are where some legal right, liberty or interest is affected. But good administration “demands their observance in other situations also, where the citizen may legitimately expect to be treated fairly.”\textsuperscript{172} The doctrine of legitimate expectation is also a nascent addition to the rules of natural justice. It goes beyond statutory rights by serving as another device for rendering justice.\textsuperscript{173} It is the constitutional principle of rule of law, which requires regularity, predictability and certainty in Government’s dealing with public.\textsuperscript{174} It is a positive concept and would apply only when a practice is found to be prevailing. But, in a case where purported expectation is based on an illegal and unconstitutional order, the same is wholly inapplicable, as the same cannot be founded on an order which is per se illegal and without foundation.\textsuperscript{175} Consistent past practice adopted by the State can furnish grounds for legitimate expectation.\textsuperscript{176}

A proposition has, thus, become well established that a person can claim a hearing before he is deprived of is legitimate expectation, Lord Bridge in \textit{Re, Westminster CC}\textsuperscript{177} said:

\begin{itemize}
\item \textsuperscript{170} \textit{Punjab Communication Limited v Union of India}, A.I.R 1999, SC 1801.
\item \textsuperscript{171} Wade & Forsyth, \textit{Supra note 9}.
\item \textsuperscript{172} \textit{Ashoka Smokeless Coal India (P) Ltd. v. Union of India}, (2007) 2 SCC 640, 702 (para 183).
\item \textsuperscript{174} \textit{Ibid}.
\item \textsuperscript{175} \textit{Poonam Verma v. Delhi Development Authority}, (2007) 13 SCC 154, 163 (para 31).
\item \textsuperscript{177} (1986) AC 668.
\end{itemize}
The Courts have developed a relatively novel doctrine in Public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation.

Lord Denning said that,178 "a man should keep his words. All the more so when the promise is not a bare promise but is made with the intention that the other party should act upon it." Just a contract is different from tort and from estoppel, so also promise may give rise to a different equity from other conduct. He elsewhere observed,179 "a promise intended to be binding, intended to be acted upon, and in fact acted upon is binding."

A person may have a legitimate expectation of being treated in a certain way by administrative authority even though he has no legal right in private law to receive such treatment. It may be based upon some express statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision. It may have arisen from the existence of a regular practice which the claimant can reasonably expect to continue. Lord Diplock in Council of Civil Services Union v. Minister for the Civil Service,180 observed:

... for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either: (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.

An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and

unambiguous. It could be a representation to the individual or generally to class of persons.¹⁸¹

Like the bulk of the administrative law the doctrine of legitimate expectation is also a fine example of judicial creativity. Nevertheless it is not extra legal and extra constitutional. A natural habitat for this doctrine can be found in Article 14 of the constitution which abhors arbitrariness and insists on fairness in all administrative dealings. It is now firmly established that the protection of article 14 is available not only in case of arbitrary ‘class legislation’ but also in case of arbitrary ‘state action’. Thus the doctrine is being hailed as a fine principle of administrative jurisprudence for reconciling power with liberty.¹⁸²

The doctrine has negative and positive contents both. If applied negatively an administrative authority can be prohibited from violating the legitimate expectations of the people and if applied in a positive manner an administrative authority can be compelled to fulfill the legitimate expectations of the people. Thus is based on the principle that public power is a trust which must be exercised in the best interest of its beneficiaries- the people.¹⁸³

4.4.1 Origin and Development in England

In England, the origins of the development of legitimate expectation lay in judicial attempts to extend procedural fairness in decision making and the right to a fair hearing.¹⁸⁴ It was originated first by Lord Denning, M.R. in the leading decision of *Schmidt v. Secretary of State for Home Affairs*,¹⁸⁵ wherein His Lordship stated that while natural justice could apply to an administrative act, it would depend upon whether the individual had some right, interest or legitimate expectation, such that it would not be fair to deprive him of it without a hearing.

¹⁸¹ Ibid.
¹⁸² *Food Corporation of India v Kamdhenu Cattle Feed Industries*, A.I.R 1993 SC 1601.
¹⁸³ Supra note 52 at 192.
¹⁸⁴ Supra note 12 at 127.
¹⁸⁵ (1969) 2 Ch. 149.
In this case, the Government had cut short the period already allowed to an alien to enter and stay in England. The Court of appeal held that the person had legitimate expectation to stay in England which could not be violated without allowing a procedure which should be fair and reasonable. The Court said that though foreigner had no legitimate expectation of being allowed to stay after the expiry of his permit, however, if his stay permit was being revoked prematurely before its expiry date, then he could claim a hearing as he was being deprived of his legitimate expectation of being allowed to stay in Britain for the period of permit. In the same year, the House of Lords in Padfield v. Trade Union of Agriculture, Fisheries and Food, held that dairy farmers have legitimate expectations that their complaint would be referred to a committee for investigation.

After these important case laws, the concept has been given a broader meaning, by the Courts in England by utilizing the legitimate expectation as the foundation for procedural rights for immigrant workers and local authorities, and thereby expanding the reach of natural justice in a beneficial manner. In Attorney General of Hong Kong v. Ng. Yuen Shin, an alien, an illegal immigrant in Hong Kong was sought to be deported without being heard. There was no statutory provision requiring hearing before making a deportation order. But the Government had given a general undertaking that each case would be decided on merits. The Privy Council, holding that the alien applicant was entitled to be heard before being deported observed;

It was only the legitimate expectation arising from the assurance given by the Government that enabled the Court to intervene on behalf of the illegal immigrant; his status as an illegal immigrant would not of itself created any entitlement to a hearing.

Lord Fraser, referring to Schmidt stated:

---

186 (1968) 1 All ER 694 (HL).
187 Supra note 78 at 415.
188 (1983) 2 AC 629.
189 Ibid.
190 Schmidt v. Secretary of State for Home Affairs, (1969) 2 Ch. 149.
First, the expectations may be based on some statement or undertaking by, or on behalf of the public authority which has the duty of making the decision, if the authority has through its officer, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.\textsuperscript{191}

Second way, in which the concept of legitimate expectation adds to the ideas of right and interest, is where there is a representation. However, the representation must be clear and unequivocal in order to generate a procedural legitimate expectation.\textsuperscript{192}

The third way, in which legitimate expectation has been held to arise, is that of established practice.\textsuperscript{193} This would be where the defendant authority has established criterion for the application of policy in a certain area, the applicant having relied on those criteria, and the defendant authority seeks to apply different criteria.

In England, the doctrine of legitimate expectation is based on the principle of equity and therefore, the benefit of the doctrine cannot be claimed as a matter of course. It is flexible in nature which can be molded to suit the requirement of each individual case. Invoking the same principle of equity, Lord Denning M.R. in \textit{Cinnamond v. British Airports Authority},\textsuperscript{194} stated that operators of cabs at an airport had no legitimate expectation which would warrant granting them a hearing. In the instant case, the Court had upheld the decision of the authority to prohibit the entry of taxi drivers into the airport because of their own past conduct which invited fines. Besides, where no promise or representation of a benefit has been made and there being no established practice of granting benefits, the principle of legitimate expectation would have no application.

Expectations have been broadly, divided into two categories, namely i.e., “procedural legitimate expectations” and “substantive legitimate expectations.” An expectation may be procedural expectation where a particular procedure not otherwise

\begin{itemize}
\item \textsuperscript{191} \textit{Ibid.}
\item \textsuperscript{192} \textit{R. v. Falmouth and Town Port Health Authority Ex.p. South West Water Ltd.}, (2001) QB 445.
\item \textsuperscript{193} \textit{CCSU v. Minister of Civil Service}, (1985) AC 374.
\item \textsuperscript{194} (1980) 2 ALL ER 368 (CA).
\end{itemize}
required has been promised. It denotes “the existence of some process right which the applicant claims to possess as the result of behaviour by the public body which generates the expectation.”\textsuperscript{195} The expression substantive legitimate expectation refers to the situation in which the applicant seeks a particular benefit or commodity, such as a welfare benefit or a license. These are often protected procedurally i.e. by extending to the concerned individual, an opportunity to make representation before the expectation is dashed.\textsuperscript{196} The doctrine of substantive legitimate expectation crystallised principally in the case of \textit{R v. North and East Devon Health Authority ex parte Coughlan},\textsuperscript{197} where it was stated by Woolf MR, Mummery LJ and Sedley LJ that:\textsuperscript{198}

Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the Court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

In \textit{Coughlan},\textsuperscript{199} the Court of Appeal made it clear both that the doctrine of substantive legitimate expectation does exist in English public law and that the arbiter of whether there is an overriding public interest which justifies the failure to honor that expectation is the Court itself. The Court is not confined to the review of the executive’s decision on the grounds of irrationality only. The Learned Judge also referred to the useful review of the state of English public law in relation to substantive legitimate expectation in the judgment of law’s LJ in \textit{Nadarajah v. Secretary of State for the Home Department},\textsuperscript{200} in which the Learned Judge made it clear that there is no distinction in principle as to the approach to be taken by the Court between procedural and substantive

\textsuperscript{195} \textit{Supra} note, 78, at 639.
\textsuperscript{196} \textit{Supra} note 9, at 504.
\textsuperscript{197} (2001) QB 213.
\textsuperscript{198} \textit{Ibid}
\textsuperscript{199} \textit{Ibid.}
\textsuperscript{200} (2005) EWCA Civ 1363, paras 46-70.
expectations. The second is that the standard of review which the Court could adopt where the executive seeks to resile from its previous promise is that of proportionality.

In the present case the Claimant accepted that the Secretary of State was entitled in principle to adopt the change of policy which was reflected in the historical cases review. What he sought to challenge was the application (or, as he submitted, misapplication) of that policy to the facts of the present case. The Secretary of State contended that any challenge to the change in policy as such would have been unsustainable because it lay within the “macro political field” rather than the field of general policy.  

The most recent case relating to substantively legitimate expectation is the decision of the Judicial Committee of the Privy Council in Paponette v. Attorney General of Trinidad and Tobago. 202 The judgment of the majority was given by Lord Dyson who quoted with approval from the opinion of Lord Hoffman in R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No.2), 203 where Lord Hoffman said that it is not essential that the applicant should have relied upon a promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with that promise would be an abuse of power. Further, Lord Dyson said that the question whether a representation is “clear, unambiguous and devoid of relevant qualification” depends on how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made. Then, he made it clear that while the initial burden lies on the applicant to prove the legitimacy of his expectation, in particular that it was clear, unambiguous and devoid of relevant qualification, and that in order to support the legitimacy of that expectation, he may be able to show that he relied on the promise to his detriment, once those elements have

been proved by the applicant the onus then shifts to the public authority concerned to justify the frustration of the legitimate expectation.\textsuperscript{204}

\textbf{4.4.2 Scope of Doctrine in India}

The doctrine of ‘legitimate expectation’ imposes in essence a duty on public authority with a view to check arbitrary exercise of power by the administrative bodies and to act fairly by taking into consideration all relevant factors relating to such legitimate expectation.\textsuperscript{205} The doctrine is still at a stage of evolution but it has generated a significant body of case law.

The doctrine is said to be based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time, even in absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised.\textsuperscript{206}

Explaining the nature and scope of the doctrine of legitimate expectation, in \textit{Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries},\textsuperscript{207} a three-Judge Bench of this Court had observed thus:

The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would

\begin{itemize}
\item \textsuperscript{204} \textit{Ibid.}
\item \textsuperscript{205} \textit{Navjyoti Cooperative Group Housing Society v. Union of India}, AIR 1993 SC 155.
\item \textsuperscript{206} \textit{Confederation of Ex-Servicemen Association v. Union of India}, AIR 2006 SC 2945.
\item \textsuperscript{207} (1993) 1 SCC 71.
\end{itemize}
satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.

Then, again in *National Buildings Construction Corporation v. S. Raghunathan & Ors.*, a three-Judge Bench of this Court observed as under:

The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which today has become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppels.

It is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The Apex Court in *R.P. Singh v. State of Bihar*, explained that the expression "established practice" referred to a regular, consistent, predictable and certain conduct, process or activity of the decision making authority. The expectation, the Court ruled should be legitimate, that is, reasonable, logical and valid. It is a concept propounded by the Courts, for judicial review of administrative action. it is procedural in character and said to be a part of the principles of natural justice. No fresh right can be created by invoking the doctrine. By reason thereof, only the existing right is saved, subject of course, to the provisions of the

---

208 AIR 1998 SC 2779.  
209 Ibid.  
The same principle was earlier followed by the Apex Court in *Navjyoti Co-op. Group Housing Society v. Union of India.*

The Supreme Court has also invoked this principle in *Supreme Court Advocates on Record Association v. Union of India,* the court held that in recommending appointment to the Supreme Court, due consideration of every legitimate expectation has to be observed by the Chief Justice of India. Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course. He has a legitimate expectation to be considered for appointment of the Supreme Court in his turn, according to his seniority. Again in *M. P. Oil Extraction Co. v. State of M.P.,* the Court held that related industries with which an agreement has been entered into by the Government can legitimately expect that the renewal clause should be given effect to in usual manner and according to past practice unless there is any special reason not to adhere to such practice. The denial of legitimate expectation would vitiate an administrative action.

In *Union of India v. International Trading Co.* the Supreme Court has observed that the change in policy can defeat a substantive legitimate expectation if it can defeat a substantive legitimate expectation if it can be justified on “Wednesbury reasonableness.” In *Bannari Amman Sugar Ltd. v. C.T.O.* the apex court maintained that where a person’s legitimate expectation is not fulfilled by taking a particular decision then authority should justify the denial of such expectation by showing some overriding public interest.

---

213 AIR 1994 SC 268 at 437.
215 AIR 2003 SC 3983.
216 *Punjab Communications Ltd. v. Union of India*, AIR 1999 SC 1801.
217 (2005) 1 SCC 625.
withdrawal of benefit, the court insisted the appellants be given an opportunity of hearing to present their side of the picture.

Recently, in *Jitendra Kumar & Ors. v. State of Haryana & Anr.*, it has been reiterated that a legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government's dealings with the public and the doctrine of legitimate expectation operates both in procedural and substantive matters.

In *Global Energy Ltd. v. Central Electricity Regulatory Commission*, the Apex Court held that the appellant, having applied for grant of license, and having been found to be qualified therefore having satisfied the statutory requirements, had a legitimate expectation that in considering the application for grant of license, the same criteria, as laid down in the statute, would be applied, when he had already started trading in electricity.

It depends very much on the facts and the recognised general principles of administrative law applicable to such facts. The concept of legitimate expectation is said to be the latest recruit to a long list of concepts fashioned by the Courts for the review of administrative action. It is observed that the concept of legitimate expectation is not the key which unlocks the treasure of natural justice and it ought not to unlock the gates which shut the court out of review on the merits, particularly when the element of uncertainty and speculation is inherent in that very concept. It has been said that legitimate expectation does not mean illegitimate flight of fancy.

---

219 AIR 2010 SC 3194.
221 M.C., Chandigarh v. Shantikunj Investments P.Ltd., AIR 2006 SC 1270.
An examination of the above mentioned decisions shows that the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfill unless some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power.\textsuperscript{222} The court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited.\textsuperscript{223}

\textsuperscript{222} Sethi Auto Service Station v. Delhi Development Authority, (2009) 1 SCC 180, 190-91 (para 32 and 33).

4.5 Doctrine of Public Accountability

Doctrine of Public Accountability is one of the most important emerging facets of administrative law in recent time. The word ‘accountable’ as defined in the Oxford Dictionary means ‘responsible for your own decisions or actions and expected to explain them when you are asked’.

It is the sine qua non of democracy. In the present time, it is increasingly used in political discourse and policy matters because it conveys an image of transparency and trustworthiness. It is the Government that is accountable to the public for delivering a broad set of outcomes but more importantly it is the public service consisting of public servants that constitutes the delivery mechanism.

According to Stewart:

Public accountability rests both on giving an account and on being held to account.

The basic purpose of doctrine is to check the growing misuse of power by the administration and to provide speedy relief to the victim of such exercise of power. It is based on the principle that the power in the hands of administrative authorities is a public trust which must be exercised in the public interest. Therefore, the laws are to be made and implemented, keeping in view the welfare of the common man. In democratic system the source of all public power are the citizens and in return the public power has to be exercised in favour of citizens. Failure to do so, judicial review could be conducted by the courts.

Public accountability mainly regards matters in the public domain, such as the spending of public funds, the exercise of public authorities, or the conduct of public

---

224 Heenavrm, “Judicial Accountability in India”, Legal India Service.Com. visited on 6.4.13 at 10.11 am.
227 Supra note 52 at 202.
institutions. It is not necessarily limited to public organisations, but can extend to private bodies that exercise public privileges or receive public funding from the government.

Under this doctrine, no public functionary can misuse his discretionary powers vested in him. In *Common Cause v. Union of India*,228 Captain Satish Sharma was charged with misuse of discretionary powers for allotment of petrol pumps. The Court awarded exemplary damages. But on review petition, the Court reversed its decision by holding that there is no specific plaintiff and if ministers work under such circumstances, they would develop a defensive attitude which would be against the interest of administration itself. If a public functionary accepts bribe he is not acting in exercise of any public duty and no protection shall be given to him.229 Therefore a government servant cannot accept bribe while discharging his official functions.230 In a landmark judgment of *P. V. Narsimha Rao v State*,231 the court observed that members of parliament who receive bribe to vote in the parliament could not be given immunity for the prosecution under Article 105 of the Constitution, as the Constitution could not protect corruption. Bribe is not a part of the normal legislative process. Hence the M.Ps. could be prosecuted under Prevention of corruption Act, 1988. Therefore, the public power cannot be misused by the administrators and if they do so a comprehensive judicial review shall be conducted by the Court on the ground of the doctrine of public accountability.

The concept of public accountability was also based on constructive trust and principle of equity. The trustee is a public servant who enriches himself by corrupt means holds the property acquired by him as a constructive trustee. This concept was laid down by Privy Council in *A.G. of Hong Kong v. Reid*,232 which has greatly widened the scope

---

228 (1999) 6 SCC 667.
229 *Gill v King*, (1948) 75 IA 41.
of this principle of jurisprudence in public law adjudication. In this case the respondent, Reid who was a Crown prosecutor in Hong Kong, took bribes as an inducement to suppress certain criminal prosecutions and with those monies acquired properties in New Zealand in his name, in the name of wife and his solicitor. The administration of Hong Kong claimed these properties on the ground that owners thereof are constructive trustees for the Crown. The Privy Council upheld the claim. In this case, the Privy Council observed that if the theory of constructive trust is not applied and properties attached when available, the danger is that properties may be sold and the proceeds whisked away to some ‘numbered bank account’.

The doctrine of public accountability as laid down in Reid case\textsuperscript{233} was followed by the Supreme Court in \textit{A.G. of India v. Amritlal Prajivandas}\textsuperscript{234} In this case the Court was dealing with the challenge to the validity of the “illegal acquired properties” in clause (c) of section 3(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA). The Act provided for the forfeiture of properties earned by smuggling or other illegal activities whether standing in the name of the offender or in the name of other parties. The Court upheld the validity of the act.

The Supreme Court in \textit{Delhi Development Authority v. Skipper Construction Co.},\textsuperscript{235} by following the above principle enlarged its scope. In this case, it was stated that even if there was no fiduciary relationship or no holder of public office was involved, yet if it is found that someone has acquired properties by defrauding the people, and if it is found that the person defrauded should be restored to the position in which they would have been but for the said fraud, the court can make necessary orders. This is what equity means and in India the Courts are not only courts of law but also courts of equity. The Court further held that all such properties must be immediately attached. The burden of

\textsuperscript{233} Ibid
\textsuperscript{234} (1994) 5 SCC 54.
\textsuperscript{235} (1996) 4 SCC 622.
proof to prove that the attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals shall lie on the holder of such properties. The Court further observed that a law like the SAFEMA has become an absolute necessity, if the canker of corruption is not to prove the death knell of this nation and suggested to the parliament to act in this matter if they really mean business.236

In this case, Skipper a private limited company had purchased a plot of land in an auction from the Delhi Development Authority but did not deposit the bid amount. When the DDA proposed to cancel the allotment Skipper obtained a stay from the High Court. Meanwhile it started selling the space in the proposed building. In this way prospective buyers of the space were cheated to the tune of about rupees 14 crore. This was done in violation of the Supreme Court order. While explaining the doctrine of public accountability, the Court applied the theory of ‘lifting the corporate veil’ in order to fix the accountability on persons who are the actual operators. The Court observed that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegality or to defraud people. In such cases the court would look at the reality behind the corporate veil so as to do justice between the parties. The court further held that in order to compensate those who are defrauded or cheated the court can pass necessary order under Article 142 of the constitution. The absence of a statutory law like the SAFEMA will not inhibit the Supreme Court while making appropriate orders under Article 142.237

In order to elaborate the public accountability further in State of Bihar v. Subhash Singh,238 the Court held that the Head of Department is ultimately responsible and accountable unless there are special circumstances absolving him of the accountability. The Supreme Court observed that no matter if there is hierarchical responsibility for

236 Ibid
237 Ibid.
decision making yet the Head of the Department/designated officer is ultimately responsible and accountable for the result of the action done or decision taken. Despite this, if there is any special circumstances absolving him of the accountability or if someone else is responsible for the action, he needs to bring it to notice of the court. The controlling officer holds each of them responsible at the pain of disciplinary action. The main object is to ensure compliance with the rule of law.

In Superintending Engineer, Public Health, U.T., Chandigarh v. Kuldeep Singh,\(^{239}\) the Supreme Court observed that every public servant is a trustee of society and in all facets of public administration, every public servant has to exhibit honesty, integrity, sincerity and faithfulness in the implementation of the political, social, economic and constitutional policies to integrate the nation, to achieve excellence and efficiency in public administration. A public servant entrusted with duty and power to implement constitutional policy, should exhibit transparency be accountable for due effectuation of constitutional goals. With this type of commitment every administrator should serve.

From the above mentioned case laws, it is clear that a judicial review of administrative action was successfully conducted by the Courts and Courts has come to conclusion that:

(i) A public officer could be held liable for abusing the Court process and would be held liable personally to pay the damages.\(^{240}\)

(ii) The principles of ‘polluter must pay’ in cases of environment pollution has been founded on the doctrine of public accountability.\(^{241}\)

(iii) The English principle of ‘strict liability’ is interpreted as ‘absolute liability’ by the courts in India.\(^{242}\)

\(^{239}\) (1997) 4 SCC 199.


(iv) For any and all types of official faults, the head of the department is to be made accountable and if he is to be absolved from the liability he has to fix the responsibility and accountability of someone else.243

(v) Forfeiture of the illegally acquired properties and the Smugglers and Foreign Exchange Manipulator (Forfeiture of Properties) Act, 1976 (SAFEMA).244

(vi) When public servant by malafide, oppressive and capricious acts in performance of official duty causes injustice, harassment and agony to common man and renders the state or its instrumentality liable to pay damages to the aggrieved person from public fund. The State or its instrumentality is duty-bound to recover the amount of compensation so paid from the public servant concerned. In this case compliance was to be reported to the Supreme Court.245

(vii) For adopting casual approach by which the land could not be purchased by authority and instead purchased by private builder, held officer personally liable.246

(viii) For irregularities committed in auction of land resulting in loss to public held official responsible for the loss.247

(ix) For oppressive, arbitrary and unconstitutional actions of public servants, held exemplary damages can be awarded.248

(x) For abuse of power for extraneous reasons in acceptance of tender, held all public officers concerned including Minister shall be liable to punishment.249

244 A.G. of India v Amritlal Prajivandan, (1994) 5 SCC 54.
(xi) For granting illegal promotion with retrospective effect which resulted in frittering away huge public funds, held that erring officers shall be personally liable.\textsuperscript{250}

(xii) For misuse of public power not only the Minister but also the official working under him will be personally liable.\textsuperscript{251} Thus departmental head is vicariously responsible for the actions of his subordinates, although in actual fact he is not responsible for their use of power which he must, of necessity, delegate to them.\textsuperscript{252}

\textsuperscript{251} Secretary, Jaipur Development Authority v. Daulat Mal Jain, (1997) 1 SCC 35.